80-1085

No. _____

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., *et al.*,

Petitioners,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the District Court must deny a preliminary injunction, regardless of the gravity of irreparable harm or the weight of other equitable considerations, unless it finds that plaintiffs are likely to succeed on the merits?

2. Did the Court of Appeals err in reversing a preliminary injunction, which enjoined pending trial the allegedly unconstitutional government taking and disclosure of petitioners' trade secret research data, by applying a test for interim injunctive relief so difficult of fulfillment that it deprives petitioners of rights under the just compensation and due process clauses of the fifth amendment?

PARTIES TO THE PROCEEDING

Petitioners submit, pursuant to amended Rule 28.1 and Rule 21.1(b), the following list of all petitioners and their United States parents, subsidiaries (except wholly owned subsidiaries), and affiliates. Some petitioners listed have numerous foreign affiliates, parents, and subsidiaries which have not been listed. Petitioners will prepare and submit an exhaustive listing of all such foreign affiliates, parents, and subsidiaries if the Court so desires.

Abbott Laboratories
Ciba-Geigy Corporation
Toms River Chemical Corporation
Alza Corporation
E.I. du pont de Nemours & Company

FMC Corporation
- Avicon, Inc.
- Cogas Development Company
- Collagen-Research Associates

Rhone-Poulenc, Inc.

Rohm and Haas Company
- Canus Petroleum Inc.
- Romicon Inc.
- Comex Inc.

Salsbury Laboratories, Inc.
- Soltex Polymer Corporation (Parent)
- Soltex Laboratories, Inc. (Parent)
  - Sea-Born Inc.

Sandoz, Inc.
- Sandoz United States, Inc. (Parent)
  - Chicago Dietetic Supply, Inc.
  - Delmark Co., Inc.
  - Northrup-King Co.
  - Ovaltine Products, Inc.
  - Rogers Bros. Seed Company

Stauffer Chemical Company
- Basic Management Inc.
- Montrose Chemical Corporation of California
- Montrose International Sales Corporation
- Mt. Pleasant Chemical Company
- North Idaho Phosphate Company
- Pacific Chemical Industries, Pty., Ltd.
- Stauffer Chemical Company of Wyoming
- SWS Silicones Corporation
- Texas Alkyls, Inc.

Union Carbide Agricultural Products Company, Inc.
- Union Carbide Corporation (Parent)
  - Grower Service Corporation (New York)
  - Soilserv, Inc.
  - Keystone Seed Company

Uniroyal, Inc.
    Computeristics, Inc.
    Monochem, Inc.
    Rubicon Chemicals, Inc.
    Intermarket Latex, Inc.
The Upjohn Company
Velsicol Chemical Corporation
    Northwest Chemco, Inc. (Parent)
    Northwest Industries, Inc. (Parent)

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DOUGLAS M. COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 24, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 481 F. Supp. 195 (1979) and is reproduced in Appendix B. The opinion of the Court of Appeals for the Second Circuit, dated September 24, 1980, is set out in Appendix A.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Second Circuit was made and entered on September 24,

1980. Plaintiffs-appellees' petition for rehearing was denied by order dated November 5, 1980; this order is set forth in Appendix D. Plaintiffs-appellees petition for a stay of the mandate pending application for certiorari was granted by order dated December 2, 1980, Appendix E. The jurisdiction of this Court to review the case on petition for certiorari rests upon 28 U.S.C. §1254(1)(1976).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The texts of the relevant constitutional, statutory and regulatory provisions are set forth in Appendix F. The provisions are cited below.

1. United States Constitution, Amendment V
2. Federal Pesticide Act of 1978, 92 Stat. 819, amending the Federal Insecticide, Fungicide, and Rodenticide Act, §§3(c)(1)(D) and 10, 7 U.S.C. §§136a(c)(1)(D), and 136h (Supp. III 1979)
3. Federal Insecticide, Fungicide, and Rodenticide Act, 86 Stat. 979, §§3(c)(1)(D) and 10, as amended on October 21, 1972
4. The Trade Secrets Act, 18 U.S.C. §1905 (1976)
5. Regulations of United States Department of Agriculture: 7 C.F.R. §1.3(b)(1) (1949 ed.); 7 C.F.R. §1.2(a) (1954 ed.); 7 C.F.R. §1.4(a) (1962 ed.); 7 C.F.R. §1.4(b)(15) (1962 ed.); 7 C.F.R. §370.13(d) (1968 ed.)
6. Regulations of United States Food and Drug Administration, Department of Health, Education and Welfare: 32 Fed. Reg. 9318-19 (1967)

BASIS FOR FEDERAL JURISDICTION

The federal courts have jurisdiction over the subject matter of this action under 28 U.S.C. §1331(a) (1976), 28 U.S.C. §1337 (1976), and 28 U.S.C. §2201 (1976).

STATEMENT OF THE CASE

Petitioners request the Court to review the judgment of the Court of Appeals, reversing a preliminary injunction issued by the District Court, which had enjoined the Environmental Protection Agency ("EPA") pending trial from publicly disclosing the petitioners' trade secret pesticide chemical research data, and from using those data to support pesticide registrations of petitioners' competitors.

Petitioners are producers of pesticide chemicals. Effective September 30, 1978, amendments to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")[1] for the first time authorized the EPA to publicly disclose trade secret research data previously submitted by the petitioners in confidence to the government, and also to use these data to support the issuance of pesticide registrations to petitioners' competitors. Petitioners challenged the constitutionality of these FIFRA amendments in the District Court and sought preliminary and permanent injunctive relief. Petitioners contended that these changes to the pesticide law were retroactive and effected a taking of their trade secret property without just compensation and due process of law in violation of the fifth amendment to the Constitution. The District Court granted a preliminary injunc-

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[1] Federal Pesticide Act of 1978, 92 Stat. 819, amending FIFRA §3(c)(1)(D) and §10, 7 U.S.C. §§136a(c)(1)(D), 136b(c)(1)(D) and 136h (Supp. III 1979). See Appendix F at 25a, 26a, and 28a.

tion. *Amchem Products, Inc.* v. *Costle,* 481 F.Supp. 195, 199 (S.D.N.Y. 1979), Appendix B, (preliminary injunction entered Aug. 15, 1979, Appendix C).

The record compiled by petitioners, consisting of extensive affidavits and exhibits, demonstrated that over a period of many years petitioners had invested huge sums in research to discover and test pesticide chemicals. The purpose of this research was to discover pesticidal uses of chemicals that were effective against a target pest but safe to humans and to the environment. When a chemical was found which met these stringent criteria, the research data which defined the chemical's safety and efficacy characteristics became of enormous competitive value worldwide.[2] Petitioners regarded the valuable portions of these research data to be trade secret properties and maintained them in confidence. Petitioners undertook the substantial risk, time, effort and expense required to perform the research with the expectation that the fruits of their labors, *i.e.*, the scientific data, would be the exclusive properties of the owners, and that the owners alone would be entitled to the competitive benefits from their use.

Beginning with the enactment of FIFRA in 1947, in order to market a pesticide a producer was required to register the product with the United States Department of Agriculture ("USDA").[3] As a condition for registra-

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[2] Fewer than one out of one million chemicals tested proves to have the safety and efficacy characteristics to be a successful pesticide. The research to develop and test a single pesticide may take ten years and cost more than twelve million dollars.

[3] Beginning in 1955, research data also were submitted to the Food and Drug Administration ("FDA") if a registrant sought to use the pesticide on food crops, pursuant to §408 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §346a (1976). The functions of both USDA and FDA were transferred to EPA in 1970. Reorganization Plan No. 3 of 1970, 84 Stat. 2086.

tion, the agencies administering FIFRA have required applicants to submit their research data to the government to prove the safety and efficacy of the product.

As enacted in 1947, FIFRA itself neither authorized nor prohibited the government from disclosing trade secret research data or from using the data to support competing registrations. The Trade Secrets Act, 18 U.S.C. §1905 (1976), however, did and does expressly prohibit the disclosure of trade secret information submitted to the government. Agency regulations confirmed that trade secret information, specifically including research data, submitted by private persons would not be disclosed.[4] In fact, trade secret pesticide research data were not disclosed by any governmental authorities without the owner's authorization. Petitioners submitted their data to the government only for use in registering their own products, and with the expectation that the trade secret information would not be disclosed to com-

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[4] *See, e.g.*, 7 C.F.R. §1.2(a) (1954 ed.) and 7 C.F.R. §1.4(a) (1962 ed.)(providing USDA will keep secret information which any statute requires to be held confidential); 7 C.F.R. §1.3(b)(1) (1949 ed.) (providing that reports and supporting data submitted by applicants are adminstratively confidential); 7 C.F.R. §1.4(b)(15)(1972 ed.)(providing that "data concerning products and formulations provided by industry for research purposes or in connection with the Department's registration and other regulatory functions" are administratively confidential); 7 C.F.R. §370.13(d)(1968 ed.) (providing that "scientific and technical data on products" and "data in research studies" where disclosure would adversely effect the respondent are trade secrets and confidental); 32 Fed. Reg. 9318-19 (1967) (amending 10 C.F.R. §5.74 and Appendix A(11) to provide that "data in support of petitions relating to pesticide chemicals" are trade secrets and confidential). See Appendix F at 35a-38a.

petitors by the government and would not be used by the government to support competing registrations.[5]

In 1972 FIFRA was amended to expressly codify in that statute a prohibition against governmental disclosure of trade secret data and use of that data to support a competitor's registration.[6] After this amendment, the petitioners continued to perform research and submit the results to EPA in reliance on the government's recognition of their trade secret property rights.

In 1978, however, a fundamental change in the law was enacted. In response to a request by EPA, FIFRA was amended to retroactively strip away the former trade secret status of these previously submitted pesticide research data[7] — data worth many millions of dollars, generated and submitted to the government in reliance on then-existing legal protections for trade secrets. Under this amendment, EPA would use these test data as a basis for granting registrations of the same pesticides to competitors of petitioners, and would disclose to the public the research data which petitioners had submitted in confidence. The EPA has stated its intention to take these actions as soon as it is freed of injunctive restraint from doing so. The trade secret data could be used by

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[5] USDA never published any regulation or policy authorizing the use of a company's research data to support a competitor's registration. Nevertheless, such use of data apparently had occurred in some instances without prior or subsequent notification to the owner. This "secret" USDA use to the extent it occurred was not authorized by any of the petitioners, and was not authorized by any statute or regulation.

[6] FIFRA §§10(b) and 3(c)(1)(D), as amended by the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973. Appendix F at 33a-34a.

[7] Appendix F at 25a, 26a and 28a.

other companies for competitive product development, for worldwide competition, and to obtain competitive U.S. pesticide registrations.

Based on this record, petitioners contended before the District Court that the 1978 FIFRA amendments effected a taking of their trade secret properties. The amendments destroyed the secrecy, and therefore the competitive value, of the data, and compelled petitioners to relinquish their exclusive ownership and to share their trade secrets with the world at large.

Petitioners contended that the taking imposed by the 1978 amendments was unlawful retroactive action, upsetting legitimate investment-backed expectations in such an arbitrary manner that it violated petitioners' right to due process of law and was therefore beyond the authority of Congress. For this reason, petitioners alleged that they were entitled to a permanent injunction to restrain this unconstitutional action.

Petitioners argued further that the taking of their trade secret property violated the fifth amendment because Congress had withdrawn any opportunity to obtain just compensation. By statutorily restricting petitioners' remedy to a non-appealable arbitration proceeding against private users, the 1978 amendment to §3(c)(1)(D) implicitly but clearly withdrew any remedy for compensation under the Tucker Act, 28 U.S.C. §1491 (1976), and made it impossible for petitioners ever to recover just compensation for this governmental taking. (See Appendix F at 26a-27a).[8] For this independent

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[8] The 1978 amendment provides for arbitration only against a private data user, not against the government. Congress considered and rejected providing any arbitration remedy at all for research data submitted prior to January 1, 1970. Senate Comm. on

reason petitioners claimed entitlement to injunctive relief against enforcement of the 1978 amendment.

The District Court applied a traditional formulation of the test for the issuance of a preliminary injunction. It stated:

> [W]hat is absolutely clear at this point is that under the tests of *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247 (2d Cir. 1973), in addition to substantial irreparable injury there are obviously serious questions going to the merits to make them a fair ground for litigation with the balance of hardship tipping decidedly toward plaintiffs who are here seeking continuing protection.

The court continued:

> The government does not dispute that if the injunction is not granted, many millions of dollars of trade research data submitted to the government over the past thirty years will in effect be destroyed in value to the submitters through disclosure to and use by their competitors. Obviously, once disclosed, trade secrets are lost forever.

Amchem Products, Inc. v. *Costle, supra,* 481 F. Supp. at 199, Appendix B at 16a. With respect to the impact of the injunction on the interested public, petitioners represented to the District Court that, despite the injunction against disclosure by EPA, they would themselves grant access to their pesticide data to public interest

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Agriculture, Nutrition & Forestry, Federal Pesticide Act of 1978, 95th Cong., 2d Sess. 64 (Comm. Print Jan. 1979). The arbitration is to be conducted by a labor mediator of the Federal Mediation and Conciliation Service. There are no standards to govern the arbitrator's award, which is "binding", and "no official or court of the United States shall have power or jurisdiction to review any such findings and determination" except for fraud or the like. Appendix F at 26a-27a.

scientists and representatives. Moreover, the injunction was drafted by agreement with EPA to permit interim use of petitioners' data by EPA for the "small business" pesticide registrants ("formulators") who do not manufacture the basic pesticide chemicals and who constitute almost 99% of all registrants. The injunction barred use of the petitioners' trade secret data only for the relatively few large competing basic producers.

On appeal, the Court of Appeals reversed the preliminary injunction on a single ground. The court held that to obtain a preliminary injunction against the enforcement of a statute, it was essential for the petitioners to show "a likelihood of success on the merits," regardless of the showing of irreparable harm or other equitable considerations. The court declared that the case presented "knotty questions that are difficult to answer on the present record. . . ." Appendix A at 7a. The court found uncertainty as to the factual issue of which data were trade secret,[9] and it found dispute on the legal issues concerning whether there had been an unconstitutional taking. The court observed that "the parties are in sharp dispute concerning whether the statutes under attack will effectuate a taking for purposes of the Fifth Amendment," and restated this Court's observation in *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978), that "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." Appendix A at 7a-8a. The court's opinion did not evaluate the merits of any of the ultimate legal issues, but only pointed out the existence of uncertainty and dispute. It concluded that

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[9] Petitioners' affidavits demonstrated that many portions of the research data were in fact trade secrets. EPA did not submit any affidavits or testimony opposing these assertions.

tioners had "failed to show a probability that the above questions will be answered in their favor and that they are likely to succeed on the merits." Appendix A at 9a.

The Court of Appeals appears to have assumed, as the District Court found, that petitioners would suffer irreparable harm if an injunction were not granted. It did not consider whether interim relief was necessary to preserve the trade secret subject matter of the case and to prevent the petitioners' constitutional rights from becoming moot by destruction of the subject matter before there could be an opportunity for trial. The Court of Appeals did not consider whether there would be an absence of any concrete injury to the public interest if an injunction were granted. The court did not attempt to review the District Court's balancing of the equities to determine whether the issuance of an injunction was warranted even if something less than a "likelihood of success" had been shown. The court based its ruling on the sole ground that the demonstration of a likelihood of success was essential, and could not be found on the record before it.

The petitioners filed a petition for rehearing, which was denied on November 5, 1980. The court, however, granted petitioners' request to stay the issuance of the mandate pending the filing of this petition for certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

The issue upon this petition is the proper standard for grant of preliminary injunctive relief. The Court of Appeals has applied a standard which makes a showing of likelihood of success on the merits an indispensable condition for grant of a preliminary injunction, regardless of the gravity of irreparable harm or the weight of other equitable considerations.

The Second Circuit's standard is erroneous, and, as applied in cases like the present, unconstitutional.

It too narrowly places determinative significance upon the single factor of the movant's chances of success on the merits. Decisions of this Court and other federal courts of appeals call for that factor to be weighed together with the irreparability of harm and with other considerations.

Further, the Second Circuit's test is too severe in cases like the present, which involve complex legal issues. It may be virtually impossible for the movant to show, on a preliminary record, the "likelihood" or "probability" of success on the merits of such complex issues. This will especially be the case where, as here, the governing law is uncertain. The movant is substantially precluded from interim relief, no matter how great the harm he will suffer without it.

In the present case, the uncertainty and complexity of the constitutional law governing uncompensated and retroactive takings led the Court of Appeals to hold that petitioners had not shown that they were likely to succeed on the merits of their claims. If the existing preliminary injunction is dissolved, petitioners would incur harm that is truly irremediable: the public disclosure of their trade secret research data. By destroying the secrecy and exclusivity of use that are the essence of the trade secret property rights, the government would destroy before trial the subject matter as to which petitioners advance their claims of unconstitutional taking. Thus the Second Circuit test contravenes the just compensation and due process clauses of the fifth amendment, by denying claimants in the position of petitioners a reasonable opportunity to get the interim injunctive relief needed to preserve their remedies under those constitutional provisions.

I. The Question of the Proper Standard for Grant of Preliminary Injunctive Relief Is an Important One Which Should Be Resolved by This Court.

A. The Second Circuit's ruling, that a preliminary injunction must be denied unless the applicant demonstrates a likelihood of success on the merits, conflicts with decisions of this Court.

The Second Circuit's uncompromising insistence upon a showing of "likelihood of success" conflicts with the standard for grant of a preliminary injunction established by this Court.[10]

In *Ohio Oil Co.* v. *Conway,* 279 U.S. 813 (1929), this Court was presented with circumstances that are strikingly similar to the case at bar. The plaintiff there sought a preliminary injunction to prevent enforcement of a Louisiana state tax statute, contending that the statute as applied to plaintiff contravened the fourteenth amendment. Because of the "real dispute over material

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[10] The term "likelihood of success" (or "probability of success"), used to test preliminary injunctions, can be ambiguous. It may be used in a way which is neutral in a quantitative sense. Thus, if it is said that the court must make a finding as to the plaintiff's likelihood of success on the merits, this may be understood simply to require the court to gauge the plaintiff's chances, whatever they may be. The phrase would be equivalent to the expression "possibilities of success on the merits" used by this Court in *Brown* v. *Chote*, 411 U.S. 452, 456 (1973), discussed below.

It is clear from its opinion, however, that the Second Circuit in the present case used the term in a different sense. It requires denial of the injunction unless plaintiffs show that their chances of success meet an *implied quantitative standard* — certainly over 50 percent, and perhaps, from the tone of the opinion, substantially more.

questions of fact which cannot be satisfactorily resolved upon the present affidavits," 279 U.S. at 814-15, plaintiff could not demonstrate a probability of success on the merits. Nevertheless, the Court recognized that preliminary relief was necessary to preserve plaintiff's remedies pending an adjudication of his claim on the merits: absent a preliminary injunction plaintiff would be without a remedy if the statute were ultimately adjudged unconstitutional, because of the lack of a state procedure to obtain restitution of money paid. The Court held that the preliminary injunction should have been granted, despite plaintiff's inability to show a likelihood of success on the merits:

> Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. 279 U.S. at 815.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 822 n.15 (1973), this Court noted that where the possibility of irreparable damage to the moving party is great enough, a preliminary injunction may be justified even though the issuing court expressly refrains from making any assessment of the likelihood of success on the merits.

In *Brown* v. *Chote,* 411 U.S. 452 (1973), the Court held that the proper standard for issuance of a preliminary injunction requires a balancing of a movant's "possibilities" of success on the merits and the possibility of irreparable harm absent interlocutory relief. *Brown* involved a constitutional challenge to a

California statute requiring candidates in primary elections to pay a filing fee. Plaintiff, allegedly an indigent, sought a preliminary injunction against enforcement of the statute to allow him to participate in the primary, the deadline for which was one week away. The district court granted the injunction, concluding that "plaintiff may prevail on the merits and that, absent a preliminary injunction, his constitutional right may be irreparably lost." *Chote* v. *Brown,* 342 F. Supp. 1353, 1355-56 (N.D. Cal. 1972). This Court held that the district court "properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted, absent interlocutory relief. . . . *[I]ssuance of the injunction reflected the balance which that court reached in weighing these factors.* . . ." 411 U.S. at 456. (Emphasis added).

The Court in *Brown* v. *Chote* did not require a showing of "likelihood of success," which suggests that the plaintiff must demonstrate better-then-even chances of prevailing on the merits. Rather, this Court's phrase "possibilities of success" in itself establishes no quantitative standard which plaintiffs must meet, but merely identifies a factor to be balanced with the possibility of irreparable injury. To require "likelihood of success," irrespective of the irreparable injury and other equitable considerations, flies in the face of the approach established by this Court.

B. The ruling of the Court of Appeals conflicts with decisions of other courts of appeals.

The Second Circuit's ruling here creates a serious conflict among the circuits, which should be resolved by

this Court. Other circuits have held that it is error to require, without regard to countervailing considerations, a moving party to demonstrate a likelihood of success on the merits as a prerequisite to interlocutory relief.

Finding that the district court had erroneously required a showing of "likelihood of success," the Fourth Circuit in *Blackwelder Furniture Co.* v. *Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977), held that a more appropriate standard is the "balance-of-hardship" test, which was "doubtless derived from *Ohio Oil Co.* v. *Conway*. . . ." 550 F.2d at 194. The test requires consideration of four distinct factors. Although likelihood of success is one of those factors, it is not indispensable, where the facts establish the possibility of irreparable harm:

> The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, *it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success.* Always, of course, the public interest should be considered. *Id.* at 196. (Emphasis added).

Likewise, in *Aguirre* v. *Chula Vista Sanitary Service and Sani-Tainer, Inc.*, 542 F.2d 779 (9th Cir. 1976), the Ninth Circuit held that it was error for the district court to "confine . . . its inquiry to whether appellants had established a probability of success on the merits." 542 F.2d at 781. The district court was directed to "balance the relative hardship to the parties that would result from granting or denying a preliminary injunction." *Id.*

In *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975), the Ninth Circuit reversed and remanded a district court's

denial of a preliminary injunction, where the district court relied only on plaintiff's failure to establish probability of success. 526 F.2d at 88. The court directed the district court to employ an alternative test requiring plaintiff to demonstrate merely "that serious questions are raised and the balance of hardship tips sharply in his favor." *Id.*

The Ninth Circuit in *Roth* v. *Bank of the Commonwealth*, 583 F.2d 527 (6th Cir. 1978), *cert. dismissed* 442 U.S. 925 (1979), approved the application of a test requiring that plaintiff raise "substantial questions" which are "fair ground for litigation," in lieu of the likelihood of success test, where the factual issues involved were very complex and the law was "far from certain." 583 F.2d at 537. The court added:

> In general, the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction. . . .

Id. at 538, quoting *Metropolitan Detroit Plumbing & Mechanical Contractors Association* v. *HEW*, 418 F. Supp. 585, 586 (E.D. Mich. 1976).

In contrast to the Second Circuit's approach here, other circuits have not required a finding that ultimate success by the moving party be a "mathematical probability," but rather have held that the "necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The District of Columbia Circuit there summarized the adoption by federal courts of the flexible balancing test:

> Our holding is generally in accord with the movement in other courts away from a standard incor-

> porating a wooden "probability" requirement and toward an analysis under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors.

559 F.2d at 844. *See also Texas* v. *Seatrain International, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975), where the court noted that "none of the four prerequisites has a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus."

The Second Circuit's decision below implies that the normal balancing test must be suspended where a statute is sought to be enjoined. That conclusion is patently in conflict with *Ohio Oil*, which also involved an injunctive challenge to a statute. Moreover, the balancing test is not altered in other circuits where a statute is at issue. For example, in *Telvest, Inc.* v. *Bradshaw*, 618 F.2d 1029, 1032 (4th Cir. 1980), the Fourth Circuit held that the decision whether to issue a temporary injunction against enforcement of a state statute "must be based upon a flexible interplay of the four factors to be considered." Where the harm to the plaintiff greatly outweighs the harm to the defendant, "plaintiff need not show a likelihood of success on the merits, for a grave or serious question is sufficient." 618 F.2d at 1033.

Likewise, in *Constructors Association of Western Pennsylvania* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978), plaintiff sought to enjoin enforcement of a federal statute requiring set-asides in public works projects for minority business enterprises. The court held that determination of whether a preliminary injunction should issue requires a "delicate balancing" of the four factors, and furthermore, that "where factors of irreparable

harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate 'even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required.' " 573 F.2d at 815, quoting *Delaware River Port Authority* v. *Transamerican Trailer Transport Inc.*, 501 F.2d 917, 923 (3d Cir. 1974).

C. It is not sound judicial administration or equity practice to require a demonstration of likelihood of success on the merits as an indispensable condition for the grant of a preliminary injunction.

Determination of the proper standard to govern the issuance of preliminary injunctions is a serious and far-reaching matter which has daily impact in the federal courts. This important question should be resolved by this Court.

The House of Lords of the United Kingdom has recently confronted the very question at issue here. Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396, strongly criticized the emphasis which some British courts had placed on assessment of the plaintiff's probability of success in determining whether a preliminary injunction should be granted. Rather than requiring the moving party to establish a probability of success, Lord Diplock stated that the court need only "be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried." *Id.* at 407. Adopting Lord Diplock's approach, the House of Lords reinstated a preliminary injunction that had been granted by a trial court but reversed by the Court of Appeal on the basis of the moving party's failure to establish a "prima facie" case on the merits.

The Second Circuit's ruling here would impair the flexibility of the district courts in fashioning decrees, which is the hallmark of federal equity jurisdiction. *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944). Courts of equity have for centuries exercised broad power in balancing the equities to determine whether a preliminary injunction should issue. Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 534 (1978). Even early formulations of the appropriate test indicate that a showing of likelihood of success on the merits is not a sine qua non for the grant of preliminary relief, if other factors are present:

> A man who comes to the Court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such questions can be disposed of.

Id. at 536, quoting W. Kerr, *A Treatise on the Law and Practices of Injunctions in Equity,* 11-12 (1867).

Fundamental fairness and sound judicial administration also should lead this Court to enunciate a test governing the issuance of preliminary injunctions that allows the federal district courts to balance equitable considerations. Probability of success alone should not be, as the Second Circuit erroneously held below, the controlling factor. Rather, the probability or possibilities of success should be considered as only one of the major elements to be assessed by the issuing court.

The stringent and unyielding test applied by the Second Circuit in this case pays no heed to the district court's needs in the common situation where it must

grant or deny a preliminary injunction on the basis of a sparse preliminary record. Although some showing must of course be made, application of an inflexible likelihood of success standard may prejudice a moving party who is under severe time constraints in moving to block the allegedly harmful event. *See, e.g., Brown* v. *Chote,* 411 U.S. 452 (1973), discussed above.

More important here, the rigid test employed by the Second Circuit ignores the inherent legal and factual difficulty of complex claims like those here presented, which the court itself said "raise knotty questions that are difficult to answer on the present record." Appendix A at 7a. Constitutional questions of this nature assuredly are difficult to resolve on a preliminary record, and a district court should not be forced to make a potentially dispositive prejudgment of the merits on such a record. The Second Circuit's test works to the clear disadvantage of all complex claims, including many constitutional claims, which are rarely mechanistically answered or easily predictable. Under the test prescribed by the Second Circuit here, a movant with an uncomplicated claim at issue could be entitled to preliminary relief, while a party with equally meritorious but more complex claims could not meet the required strict showing of likelihood of success and thus could not obtain preliminary relief.

Most egregiously, the uncompromising standard employed by the Second Circuit fails to make any accommodation for the situation in which, absent preliminary relief, plaintiffs may face vast and irreparable loss, as in this case. The District Court below found that, absent preliminary relief, petitioners would be irreparably harmed, Appendix B at 16a, and the Second Circuit did not dispute that conclusion. See Appen-

dix A at 6a. District courts should not be required to turn blindly away from equities such as these to follow a mechanical and unrealistic standard governing preliminary injunctions, nor should they forfeit their traditionally broad discretion in fashioning equitable decrees appropriate to the circumstances confronting them.

A standard for the issuance of preliminary injunctions which requires the district court to balance the relevant considerations has the further advantage of assuring that due weight is given to public interest concerns. Experience in other circuits demonstrates that threats to the public interest will be weighed along with the other factors by the issuing court. *See, e.g., Quaker Action Group* v. *Hickel,* 421 F.2d 1111, 1117 (D.C. Cir. 1969). The public interest considered must also include the importance of preserving the status quo in order to provide an opportunity for the full and fair litigation of important questions: "[T]he public interest demands that any assertion of constitutional and legal rights, quite apart from the rights of the magnitude at issue in this proceeding, be adjudicated in an orderly, principled and judicious manner." *American Medical Association* v. *Weinberger,* 522 F.2d 921, 926 (7th Cir. 1975).

II. The Constitutional Prohibitions Against Taking of Property Without Just Compensation and Without Due Process of Law Require That Plaintiffs Must Have a Realistic Opportunity to Obtain Interim Relief That Is Necessary to Preserve Their Constitutional Remedies.

The overriding practical fact of this case is that the petitioners' trade secrets are readily destructible by the government's public disclosure and use of the secret

data. This means that a preliminary injunction against such destruction is the only way to preserve petitioners' remedies under the just compensation clause and the due process clause until determination of the merits after trial.

If the existing preliminary injunction is dissolved, EPA will immediately release petitioners' secret test data to the public, and use them to support competitors' registrations, thereby destroying petitioners' basic property rights in most or all of their data. Petitioners' contentions are that these actions and the 1978 statute under which they would be taken effect an unconstitutional taking of their trade secret property rights, both because their retroactive effects violate due process limitations, and because just compensation will not be provided as a result of withdrawal of the Tucker Act remedy. But, even if petitioners were to prevail at trial on these contentions, the permanent injunction to which they would be entitled could have little meaning, since the property that was its subject would have been destroyed in the interim. Petitioners would be left without a realistic remedy for the constitutional wrongs done them.

The question, then, concerns what preliminary showing on their constitutional claims plaintiffs must make to get a preliminary injunction in these circumstances.

Petitioners submit that, under the protections of the just compensation clause and the due process clause, the standard governing the showing required for grant of a prelimimary injunction *cannot be so restrictive as to automatically or nearly automatically deny interim relief which is essential to preserve remedies against an unconstitutional taking.*

The just compensation clause of the fifth amendment is couched in clear, prohibitory language: "nor shall private property be taken for public use, without just compensation." A governmental action which takes property without paying just compensation directly contravenes the amendment, and can be enjoined. *See Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 601-02 (1935); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932).

The command of the due process clause is equally direct. It states that no person shall "be deprived of . . . property, without due process of law." Governmental action which takes private property without due process of law also can be enjoined. *See Louisville Joint Stock Land Bank, supra*, 295 U.S. at 601-02; *Ettor* v. *Tacoma*, 228 U.S. 148, 155-56 (1913).

Petitioners have made substantial showings below that the 1978 FIFRA amendments contravene both the just compensation and due process clauses of the fifth amendment and may be enjoined on both those grounds. Petitioners have made a substantial showing that the 1978 amendments effect a taking of property within the fifth amendment. Petitioners have also shown that this taking, because of its grossly retroactive effects, deprives them of due process of law. Petitioners further have shown that the 1978 FIFRA amendments have withdrawn the availability of the Tucker Act and have left petitioners without a remedy to provide the constitutionally required just compensation for the taking.

Both lower courts have acknowledged that petitioners' contentions by their nature raise complex and difficult issues which can be definitively decided only after a full trial on the merits. If the property in ques-

tion were durable, and could survive the interim action of the government, petitioners could simply await the results of that trial. But in fact petitioner's trade secret property is immediately destructible, and in the interim will be largely or totally destroyed by the governmental action. Even if petitioners ultimately prevail on their claims, the subject matter of the proceeding will be destroyed, and they will receive neither just compensation nor meaningful injunctive relief.

In such circumstances, the constitutional protections against taking without just compensation and deprivation of property without due process of law require that *plaintiffs must have a realistic opportunity to obtain the interim relief which is necessary to preserve their constitutional remedies.*

By contrast, the standard for preliminary injunction applied by the Second Circuit is unrealistic to the point of being virtually impossible to fulfill in cases like the present, where contentions of fifth amendment takings are involved.

The court declared that petitioners must show the "likelihood of success" on their contentions in order to get a preliminary injunction. This is a high standard. It demands more than a substantial showing of serious questions or a fair ground for litigation where equities favor the applicant. The Second Circuit applied this test in a draconian fashion by making it an indispensable condition for a preliminary injunction, regardless of how strong are the equities favoring the applicants and regardless of how grave and irreparable the harms they incur.

But, having so spoken, the court throughout its opinion manifested an assumption that "taking" claims are

by their nature often so complex that a likelihood of success simply cannot be shown on a preliminary record. Addressing petitioners' contentions of taking in violation of the fifth amendment, it said: "Those allegations raise knotty questions that are difficult to answer on the present record, especially where the answers sought must be sufficiently favorable to appellees to indicate a likelihood that they will succeed on the merits." Appendix A at 7a.[11] The court noted that "the parties are in sharp dispute concerning whether the statutes under attack will effectuate a taking for purposes of the Fifth Amendment," quoted an observation of the Supreme Court that "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 123 (1978), and declared that "[t]he applicability of this statement to appellees' claim is apparent from the motion papers." Appendix A at 8a.

Plainly, to the court, such taking claims *generically* involve issues of such inherent difficulty that they cannot meet the court's likelihood of success standard.[12]

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[11] Although it declared that the District Court was in error in applying a "less onerous" test than that requiring likelihood of success (Appendix A at 6a), the court did not remand for amplification of the record and further proceedings under the "correct" test in the District Court. The Court of Appeals reviewed the same written record as did the district judge. See Appendix A at 9a. Thus petitioners, having shown serious questions presenting a fair ground for litigation, had no chance to try to make showings that would meet the higher standard imposed by the Court of Appeals, and that court plainly saw no point in their doing so. See Appendix A at 6a. The implication is that the court believed that its "likelihood of success" standard could not be met in a complex taking case such as the one at bar.

[12] In addition to the central taking and Tucker Act contentions, the court referred to several subordinate questions — about what

The Second Circuit is no doubt correct in this perception. Taking contentions under the fifth amendment *are* complex. In the *Penn Central* case just cited, Mr. Justice Brennan went on to say that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government," and characterized these as "*essentially ad hoc, factual inquiries.*" (Emphasis added). 438 U.S. at 124. Mr. Justice Brennan continued with reference to "factors" significant to these inquiries, including (of particular relevance here) the extent of interference with distinct investment-backed expectations, and whether or not the alleged taking is a physical invasion of property. Clearly, the close analysis and balancing of factors determinative of taking claims can be pursued only through the detailed processes of trial on the merits. The abbreviated procedures available upon application for interim relief cannot afford the court any adequate basis for deciding whether the applicant is ultimately likely to succeed on such complex issues.

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portions of petitioners' test data could be characterized as trade secret before 1978, about distinctions between the EPA's use and its disclosure of the data, and about reliance on a right of confidentiality before a specific statute existed — which, as the court stated about one and implied about the others, "complicate the problem in the instant case." Appendix A at 8a. The court did not endeavor to evaluate the merits of these issues, but it clearly suggested that their presence made it even harder to show the requisite likelihood of success. That may be, if to get a preliminary injunction plaintiffs are obliged to establish not only their central taking contentions but all other detailed and logically subsequent elements of their case. But that is what a trial on the merits is for. The question here is whether a preliminary injunction is essential to prevent deprivation of plaintiffs' property without realistic access to the remedies assured by the just compensation and due process clauses.

Thus: To get interim relief, a plaintiff *must* show likelihood of success. But a plaintiff with a taking claim, as a practical matter, often *cannot* show likelihood of success on a preliminary record. Under the Second Circuit's standard, he cannot get a preliminary injunction, and the government is free to take and destroy a plaintiff's property and his prospects for constitutionally assured relief against that action. The likelihood-of-success standard applied by the Second Circuit in the circumstances of this case therefore not only is unreasonable but is unconstitutional. Plaintiffs who are faced with an uncompensated or retroactive taking, and threatened additionally with the interim taking or destruction of their property before trial, are debarred from all realistic opportunity to preserve their property and the remedies to which they are entitled under the just compensation and due process clauses if their claims prove well-founded after trial. The Second Circuit's test substantially assures that such plaintiffs will be deprived of those constitutional rights without a remedy. It thus contravenes the just compensation and due process clauses.

Moreover, by effectively destroying petitioners' opportunity to vindicate their claims at trial, the unachievable likelihood-of-success standard renders the preliminary injunction hearing meaningless. In this additional way, it deprives petitioners of property without due process of law. *See Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit (September 24, 1980)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 921 — September Term, 1979
(Argued April 3, 1980 Decided September 24, 1980)
Docket No. 79-6200

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., *et al.*,
Plaintiffs-Appellees,

v.

DOUGLAS M. COSTLE, as Administrator of the Environmental Protection Agency and United States Environmental Protection Agency,
Defendants-Appellants.

Before:
FEINBERG, *Chief Judge*, VAN GRAAFEILAND, *Circuit Judge*, and HAIGHT, *District Judge.**

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* The Honorable Charles S. Haight, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Owen, J., preliminarily enjoining the Environmental Protection Agency from enforcing against appellees two provisions of the Federal Insecticide, Fungicide, and Rodenticide Act.

Reversed.

MICHAEL H. DOLINGER, Assistant United States Attorney (William M. Tendy, United States Attorney for the Southern District of New York, Peter C. Salerno, Assistant United States Attorney, and Edward C. Gray, Deputy Associate General Counsel, United States Environmental Protection Agency, on the brief), *for Defendants-Appellants.*

ROBERT L. ACKERLY, Washington, D.C. (Sellers, Conner & Cuneo, Washington, D.C., John D. Conner; Allan J. Berlowitz, Arthur, Dry & Kalish, New York, N.Y., on the brief), *for Plaintiffs-Appellees.*

VAN GRAAFEILAND, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Southern District of New York which preliminarily enjoined appellants, the Environmental Protection Agency (EPA) and its Administrator, from enforcing against appellees two provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), section 3(c)(1)(D), 7 U.S.C. §136a(c)(1)(D), and section 10, 7 U.S.C. §136h(d) (Supp. II 1978). The district judge found that appellees had raised serious questions going to the merits, had snown substantial irreparable harm and a balance of hardships tipping in their favor, and were therefore entitled to preliminary injunctive relief. We reverse.

Appellees are producers of pesticide chemicals. Since 1947, FIFRA has required them to register their pesticides with the federal government. The United States Department of Agriculture (USDA) administered the registration program from 1947 until 1970, when EPA assumed that responsibility. To assist the USDA in evaluating registration applications, the 1947 law gave it discretion to require the submission of "a full description of tests made and the results thereof upon which the claims are based". 7 U.S.C. §135b(a)(4). Acting under this provision, the USDA required each applicant to submit data showing both the efficacy of the pesticide and the hazards, if any, in its use.

These data are the subject of this litigation. Appellees test thousands of compounds for efficacy, safety, and other properties before they ultimately offer one for sale as a commercial pesticide. This costly research and lengthy development process produce data that define the peculiar characteristics of the pesticide submitted for registration. Data of this nature must be submitted to obtain registration not only in the United States but in many other countries as well. Without them, a manufacturer cannot compete effectively in the pesticide market. Appelles contend that the data submitted by them are common law trade secrets in which they have a property interest.

As enacted in 1947, FIFRA did not specifically prohibit the USDA from publicly disclosing submitted data or from using data supplied by one applicant to determine whether to register a pesticide offered subsequently by another. Although there is a dispute on this issue, it appears that the USDA made no public disclosures of data but did make use of data on hand in evaluating later applications. *See Amchem Products Inc.* v. *GAF Corp.*, 594 F.2d 470, 472 (5th Cir. 1979).

In 1972, Congress amended FIFRA to prohibit the public disclosure of information which, in the judgment of the EPA Administrator, contained or related to "trade secrets or [confidential] commercial or financial information". Pub. L. No.

92-516, §2, 86 Stat. 989 (1972). The 1972 amendments also prohibited the EPA for the first time from using data submitted by one company in support of another company's registration application, if, in EPA's judgment, such data were trade secrets or confidential commercial or financial information. Pub. L. No. 92-516, §2, 86 Stat. 979-80 (1972). The amended Act was ambiguous, however. It failed to define "trade secrets", and it did not reveal whether the new limitations on use applied to data submitted before the effective date of the 1972 amendments. The latter ambiguity was resolved in 1975 when Congress provided that the new use restrictions applied only to data submitted on or after January 1, 1970. Pub. L. No. 94-140, §2, 89 Stat. 755 (1975). Definition of "trade secret" was left to the Administrator and the courts.

The EPA took the position that the 1972 and 1975 amendments restricted use and disclosure of only a narrow range of data, such as formulas and manufacturing processes, and did not include the hazard and efficacy data at issue here. In a series of lawsuits, the industry challenged this view, meeting with some success. Several district courts held that test data might be considered a trade secret if the data met the requisites of that term as set forth in section 757, comment b, of the Restatement of Torts.[1] *See, e.g., Mobay Chemical Corp.* v. *Costle*, 447 F.Supp. 811, 824-27 (W.D. Mo. 1978), *appeal dismissed*, 439 U.S. 320 (1979); *Chevron Chemical Co.* v. *Costle*, 443 F.Supp. 1024, 1031-32 (N.D. Cal. 1978); *Dow Chemical Co.* v. *Costle*, No. 76-10087, (E.D. Mich., Nov. 16, 1977).

As originally filed on June 30, 1976, the present lawsuit also challenged EPA's construction of the 1972 and 1975

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[1] According to the Restatement, "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."

amendments. While the litigation was in progress, however, Congress enacted the Federal Pesticide Act of 1978, which amended FIFRA to reflect the EPA's position. Pub. L. No. 95-396, 92 Stat. 819 (Sept. 30, 1978).[2] Appellees then amended their complaint so as to attack the new provisions on constitutional grounds. Appellees contend that the disclosure and use provisions of the 1978 amendments constitute a taking of their property without just compensation or due process of law.

In an unreported opinion dated July 5, 1979, the district court granted appellees' application for a temporary injunction prohibiting the unconsented-to disclosure and use of appellees' trade secret research and test data submitted on or before September 30, 1978, the date of the 1978 Act.[3] It is this injunction order that we now reverse.

In arguing for affirmance, appellees rely heavily on the oft-repeated doctrines that the purpose of a preliminary injunction is to preserve the status quo, *Unicon Management Corp.* v. *Koppers Co.*, 366 F.2d 199, 204 (2d Cir. 1966), and avoid irreparable injury, *New York Pathological and X-Ray Laboratories, Inc.* v. *INS*, 523 F.2d 79, 81 (2d Cir. 1975), and that the grant of preliminary relief is an exercise of the trial court's discretion which will not be disturbed on appeal unless the trial judge has abused his discretion or misinterpreted the law. *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976).

[2] In substance, the amended statute permits disclosure of data concerning test results and the environmental effects of a pesticide, with limiting exceptions as to manufacturing and quality control processes, methods for testing, detecting or measuring added inert ingredients, and the identity and quantity of the added inert ingredients. 7 U.S.C. §136h (Supp. II 1978). The EPA is also authorized to use the data already in its files, with provision made in some cases for payment of appropriate compensation by the use beneficiary. *Id.* at §136a(c).

[3] The injunction order contained a limited exception applicable to formulators of the end-use pesticide products, who purchased registered pesticide chemicals from producers such as appellees.

Appellants, on the other hand, point to the reiterated rule that interim injunctive relief is an extraordinary and drastic remedy which should not be routinely granted, particularly if the grant may adversely affect the public interest in a manner which cannot be compensated for by an injunction bond. *Medical Society of New York* v. *Toia*, 560 F.2d 535, 538 (2d Cir. 1977). Appellants also remind us of the well-established rule that where, as here, there has been no evidentiary hearing in the trial court, this Court is in as good a position as the district judge to interpret the motion papers and may therefore take a closer look at what the district judge has done. *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 879 (2d Cir. 1972). Giving due deference to the arguments of both sides, we are convinced that the order appealed from cannot stand.

Before a preliminary injunction will be granted in this Circuit, it must pass one of two tests. Both require a showing of irreparable harm. One requires in addition that the moving party show a likelihood of success on the merits. The other requires that there be sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the moving party. *Jack Kahn Music Co.* v. *Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir. 1979). The district judge applied the second and less onerous of these two tests. This was error. When Congress authorizes or mandates governmental action that is in the public interest, more than a "fair ground for litigation" must be shown before the action will be stopped in its tracks by court order. *Medical Society of New York* v. *Toia*, *supra*, 560 F.2d at 538. The district court's misconception of the applicable legal standard requires reversal.

However, if the alternative "likelihood of success" test were applied, the result would be the same. Appellees' suit seeks declaratory and injunctive relief, not damages. Their claim in substance is that, insofar as FIFRA permits EPA to disclose and use their trade secret test data without just compensation or prior notice, it violates the Fifth Amendment.

Those allegations raise knotty questions that are difficult to answer on the present record, especially where the answers sought must be sufficiently favorable to appellees to indicate a likelihood that they will succeed on the merits.

In the first place, there is the question whether all or only part of appellees' test data properly could have been characterized as a trade secret prior to the 1978 amendment of FIFRA and whether this characterization should have been made in the first instance by the EPA Administrator. The 1972 amendment, the first to give appellees statutory protection against unauthorized use and disclosure, placed the responsibility for this initial determination in the Administrator's hands. *See* Pub. L. No. 92-516, §10(b), 86 Stat. 989 (1972) (current version at 7 U.S.C. §136h(b) (Supp. II 1978)); *Mobay Chemical Corp.* v. *Costle*, *supra*, 447 F. Supp. at 824-27.

To the extent that appellees' test data fall within the definition of trade secret, the parties agree that the data are property interests entitled to due process protection. *See Zotos International, Inc.* v. *Kennedy*, 460 F.Supp. 268, 272-73 (D.D.C. 1978); 14 *Williston on Contracts*, 3rd Edition, §1645 at 194.[4] However, the parties are in sharp dispute concerning whether the statutes under attack will effectuate a taking for purposes of the Fifth Amendment. Appellants rely on cases such as *Andrus* v. *Allard*, 48 U.S.L.W. 4013 (Nov. 27, 1979) and *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) to support their claim of no taking. Appellees base their opposing argument on cases such as *Kaiser Aetna* v. *United States*, 48 U.S.L.W. 4045 (Dec. 4, 1979), *Armstrong* v. *United States*, 364 U.S. 40, 46-49 (1960), *United States* v. *Causby*, 328 U.S. 256 (1946), and *Aris Gloves, Inc.* v. *United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970). The Supreme Court observed in *Penn Central*, *supra*, that "what

[4] The Supreme Court discusses trade secrets in terms of "intellectual property". *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 478, 479, 482 (1974).

constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." 438 U.S. at 123. The applicability of this statement to appellees' claim is apparent from the motion papers.

To complicate the problem in the instant case, a distinction must be made between EPA's use of appellees' data and its disclosure of the data to the public. The district court erroneously treated use and disclosure alike for purposes of the temporary injunction. Finally, there is the basic issue whether appellees are entitled to rely on a vested right of confidentiality in their trade data, most of which was filed before any statutory provision for confidentiality existed. *See Westinghouse Electric Corp.* v. *United States Nuclear Regulatory Commission*, 555 F.2d 82, 95 (3d Cir. 1977).

Assuming that appellees succeed in showing an unconsented-to taking of their property, they must still establish that they are without an adequate remedy in the Court of Claims under the Tucker Act, 28 U.S.C. §1491. "Where the action against which specific relief is sought, is a taking or holding of the plaintiff's property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949). The Fifth Amendment does not require that compensation precede the taking. *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932).

Unlike the district court, we do not read *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), as rejecting the doctrines enunciated in *Larson* and *Hurley*. The question of Tucker Act remedy entered *Duke Power* only as it bore on the jurisdiction of the district court to consider the limitation of liability provisions of the Price-Anderson Act, 42 U.S.C. §2210. The issue on this appeal is not jurisdiction, but the substantive right to injunctive relief. If compensation under the Tucker Act is available, injunctive relief is not. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

FIFRA need not expressly provide for recourse to a Tucker Act remedy in order for that remedy to be available; the question is whether the Tucker Act remedy has been withdrawn. *Id.* at 126. The district court did not find that withdrawal had taken place or even that it probably had taken place. It found simply that a question of withdrawal existed. "Likelihood of success" requires more substantial underpinnings than this.

After reviewing the same written record as did the district judge, we conclude that appellees have failed to show a probability that the above questions will be answered in their favor and that they are likely to succeed on the merits. They are not entitled therefore to interim injunctive relief.[5]

The order appealed from is reversed.

[5] Appellees' claim that irreparable loss may result from the lifting of the injunction does not leave the Court unmoved. However, if appellees have a meritorious cause of action, the risk of irreparable loss might have been avoided by recourse to Fed. R. Civ. P. 65(a)(2).

APPENDIX B

Opinion of the United States District Court for the Southern District of New York (July 5, 1979)

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

AMCHEM PRODUCTS, INC., *et al.*,
Plaintiffs,

v.

DOUGLAS M. COSTLE, as Administrator of the Environmental Protection Agency, *et al.*,
Defendants.

No. 76 Civ. 2913.

July 5, 1979.

OPINION

OWEN, *District Judge.*

Plaintiffs Amchem Products, Inc., et al., are engaged, among other things, in the development and production of pesticide chemicals.

Plaintiffs request a preliminary injunction restraining the Environmental Protection Agency from disclosing research data which was submitted to government agencies in support of various pesticide applications and which plaintiffs consider to be trade secrets. It appears that EPA intends to use these data for the benefit of competitors in the issuance of pesticide registrations. Plaintiffs challenge the federal statute which purports to authorize such disclosure and use, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 *et seq.* (hereinafter "FIFRA"), on the ground that it retroactively divests plaintiffs of their property rights, effecting a taking of property without just compensation or due process of law, in violation of the Fifth Amendment to the Constitution.

According to the plaintiffs, a chemical is valuable as a pesticide only to the extent it is both effective against the target organism and safe to non-target organisms, including human beings, and to the environment in general. Conse-

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quently, the development process has always been characterized by a substantial investment in scientific research and testing to determine the efficacy, safety and environmental effects of a potential pesticide, resulting in the production of voluminous scientific research data. The government does not dispute this. Plaintiffs contend, therefore, that in a very real sense, these data are their commercial product, and provide the key to the market. Because the development and exclusive possession of these data confer a substantial competitive advantage upon their originator, pesticide manufacturers have always considered significant portions of such data to be trade secrets, and have protected them accordingly. The government in some measure does dispute this.

The proprietary nature of trade secret property, such as research data, has long been recognized by the federal, state, and common law. In the pesticides field, federal agencies have been receiving research data from registrants since 1947 under laws and regulations which provided for confidential treatment of trade secret information, and no federal agency has ever disclosed such data. Plaintiffs invested millions of dollars to produce these research data with the legitimate expection that they were protected as trade secrets, and that their trade secret status would continue to be respected by the government.

On September 30, 1978 FIFRA was amended to authorize the disclosure of trade secrets for the use and benefit of competing manufacturers in applying for pesticide registrations. No payment is required to the data submitter for use of data submitted prior to January 1, 1970. Payment is required to be made by a competing applicant to an original data submitter for use of trade secrets submitted on or after January 1, 1970, and during a period of 15 years from the date of the registration of the pesticide for which the data was originally submitted. The terms of payment are to be arbitrated if agreement cannot be reached. As to data submitted after September 30, 1978, it is protected only for a period of ten years from the date of registration of the pesticide concerned and thereafter is without protection.

In response to the passage of the Federal Pesticide Act, plaintiffs have filed a Fourth Amended Complaint, consisting of six counts. Counts I and II challenge the constitutionality of the Federal Pesticide Act of 1978 insofar as it may retroactively divest pesticide research data submitted to EPA and its predecessor agencies between 1947 and September 30, 1978 of their formerly recognized trade secret status, and authorizes EPA to disclose these research data and use them for the economic benefit of plaintiffs' competitors in registering their pesticide chemicals.

The plaintiffs assert that competition in the pesticide industry occurs primarily through research and development. A firm's competiveness depends principally on its ability to develop new products and to develop new and better uses for existing products. Because of the enormous risk and expense involved in new product development, firms invest substantial portions of their research funds in improvement of existing products.

In order to be competitive, plaintiffs have made conscious corporate decisions to engage in these research and development activities. These efforts, which began as long ago as 1939, have involved the construction and maintenance of sophisticated research laboratories and research farms staffed by highly qualified research scientists, toxicologists, biologists, and organic chemists. Obviously, the research and development process can be lengthy, complex and exceedingly expensive.

The final products of the research and development process are the research and test data which define the properties of the pesticide and establish its safety and efficacy for commercial use. It is the possession of these data alone which enables plaintiffs to market a pesticide chemical commercially and compete in the industry.

Obviously, therefore, the data generated as a result of plaintiffs' research and development activities have immense value in the conduct of plaintiffs' business. Research data not

only are essential for pesticide registration, but are also required to meet the standards of states and foreign governments.

The experimental and analytical methodologies devised by plaintiffs during the research and development process for one pesticide chemical are especially valuable in the development of other products. Research data are valuable for developing new non-pesticidal uses for known pesticide chemicals.

Thus, the possibilities for use of pesticide research data to discover new valuable uses for pesticide chemicals are limited only by the skill and imagination of the scientists who review them.

Consequently, plaintiffs assert that pesticide research data are valuable for a wide variety of uses, and anyone possessing these data and the requisite scientific and business skills could use the data for similar purposes. If plaintiffs' competitors were to obtain access to these research data, plaintiffs would lose the substantial competitive advantage earned through research efforts; and their competitors could appropriate the value and use of these data without themselves expending the cost in labor, facilities, money and inventiveness that was required of the plaintiffs.

Because of the extensive effort and expense that go into the development of trade research data, plaintiffs have apparently taken stringent precautions in the past to insure their protection. Further, while obviously the end product is fully and publicly disclosed both as to make-up and efficacy, the agencies that have received plaintiffs' research trade secret data to consider its registration have, the plaintiffs contend, always held the research data in confidence. Indeed, it appears that after the passage of the Freedom of Information Act in 1967, the Food and Drug Administration reconfirmed that "data in support of petitions relating to pesticide chemicals" were confidential information within the "trade secrets" exemption and could not be disclosed.

Further, the Trade Secrets Act, 18 U.S.C. §1905 prohibits the unauthorized disclosure of trade secrets by agency officials and makes such disclosure punishable as a crime.

Against this background, the plaintiffs contend that the 1978 amendment to FIFRA is a retroactive taking of their property in violation of the Fifth Amendment and the appropriation of its use to the economic benefit of competing manufacturers.

In response to this, the defendants, and particularly the Administrator of EPA, which is charged with enforcing FIFRA, assert that the 1978 legislation was an authorized and reasonable exercise of Congress' police power authority under the Commerce Clause to protect the public welfare, enhance competition in the pesticide industry, and serve other important interests. Defendants also contend that plaintiffs retain the ability to make reasonably beneficial use of their property.

The government further asserts that disclosure of these data to the public is an appropriate means to lessen the likelihood that commerce in pesticides will cause harm to the public; that there is a general public interest in knowing how the government's decisions about these products are made and in holding the government accountable for the quality of its scientific assessments; that the withholding of research data inhibits the pursuit and advancement of scientific knowledge; that full disclosure plays a vital role in expanding the store of human knowledge and that a preservation of the secrecy of research data places entry barriers against the smaller firms attempting to enter the market, thereby reducing competition in what is already an oligopolistic industry, causing higher prices.

Finally, the government asserts that to the extent there has been a taking of protected property, there exists an adequate legal remedy under the Tucker Act, 28 U.S.C. §1491.

I do not deem it at all clear, given the specific provisions for payment and non-payment provided for in the 1978 FIFRA amendment 7 U.S.C. §136a(c)(1)(D) that relief under

the Tucker Act is the simple answer that the government claims. Not only does FIFRA expressly provide as to certain data there shall be no compensation at all, 7 U.S.C. §136a(c)(1)(D)(iii), thus raising the question of the withdrawal of Tucker Act jurisdiction, see *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), but also, and more to the point, plaintiffs here do not seek damages but rather a declaratory judgment of unconstitutionality prior to sustaining potentially uncompensable damages. This they may properly do. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n.15, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

Next, turning to what is clearer: (1) trade secret research data is treated as property within the intendment of Fifth Amendment protection, *American Sumatra Tobacco Corp.* v. *SEC*, 68 App.D.C. 77, 93 F.2d 236 (D.C.Cir.1937); *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974); and (2) under certain circumstances the appropriation of one person's private property for use by members of the public is a taking. *Loan Association* v. *Topeka*, 20 Wall 655, 87 U.S. 655, 22 L.Ed. 455 (1874). Surely this is so even where, as here, the taking is not absolute but consists instead of a severe diminution of the value of plaintiff's property.

Finally, what is absolutely clear at this point is that under the tests of *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247 (2d Cir. 1973), in addition to substantial irreparable injury there are obviously serious questions going to the merits to make them a fair ground for litigation with the balance of hardship tipping decidedly toward plaintiffs who are here seeking continuing protection. The government does not dispute that if the injunction is not granted, many millions of dollars of trade research data submitted to the government over the past thirty years will in effect be destroyed in value to the submitters through disclosure to and use by their competitors. Obviously, once disclosed, trade secrets are lost forever.

For the foregoing reasons, the preliminary injunction restraining the Environmental Protection Agency from disclosing trade secret research data and from using this data for the benefit of competitors in the issuance of pesticide registrations is granted pending a trial on the merits herein. In the circumstances of this case I conclude that a bond is not required. The parties are to appear before me on August 14, 1979, at 4:30 P.M. in Courtroom 2804 to fix a date for trial on the merits.

Submit order on notice.

APPENDIX C

Preliminary Injunction Order of the United States District Court for the Southern District of New York (August 14, 1979)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., *et al.*,

Plaintiffs,

v.

DOUGLAS M. COSTLE, as Administrator of the United States Environmental Protection Agency, *et al.*,

Defendants.

76 Civ. 2913
Richard Owen

PRELIMINARY INJUNCTION

August 15, 1979

Upon consideration of the plaintiffs' motion for a preliminary injunction, the memoranda and affidavits submitted by the parties, and the arguments of counsel at the hearing on the motion, and in accordance with the Court's opinion filed on July 9, 1979, it is

ORDERED that, pending a trial on the merits on plaintiffs' application for a declaratory judgment and permanent injunction, the defendants and their agents, officers and other subordinates and all other persons acting by or with them, are hereby enjoined and restrained from:

(1) Disclosing any plaintiff's claimed trade secret research or test data pertaining to pesticide chemicals, in the files of the United States Environmental Protection Agency and submitted by the plaintiff through September 30, 1978, without the permission of the data submitter.

(2) Using or considering any plaintiff's aforesaid research or test data to support any pesticide registration action

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(including registration, reregistration, amendment of a registration, or issuance of a supplemental registration) on behalf of any other applicant or registrant without the prior permission of the data submitter; provided that this paragraph shall not apply to:

(a) any registration action which plaintiffs have stated in writing will not be opposed; or

(b) the registration of a formulated (end-use) product issued to an applicant who certifies (i) that it will purchase the registered technical pesticide from a pesticide producer in order to formulate the purchased pesticide into the end-use product, and (ii) that the applicant does not own or control, and is not owned or controlled by, such producer or any other company that also owns or controls such producer.

No bond is required.

/s/ Richard Owen
RICHARD OWEN
United States District Judge

Dated: August 14, 1979

APPENDIX D

Order of the United States Court of Appeals for the Second Circuit Denying Petition for a Rehearing (November 5, 1980)

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of November, one thousand nine hundred and eighty.

Present: HON. WILFRED FEINBERG,
Chief Judge
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judge
HON. CHARLES S. HAIGHT
District Judge

Docket No. 79-6200

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., CIBA-GEIGY CORP., FMC CORP., RALSTON PURINA CO., RHODIA INC., ROHM & HAAS CO., THE UPJOHN CO., UNIROYAL INC., E.I. DUPONT DE NEMOURS & CO., and VELSICOL CHEMICAL CORP.,

Plaintiffs-Appellees

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
A. DANIEL FUSARO,
Clerk

APPENDIX E

Order of the United States Court of Appeals for the Second Circuit Granting Motion for Stay of Mandate (December 2, 1980)

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 2nd day of December, one thousand nine hundred and eighty.

79-6200

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., CIBA-GEIGY CORP., FMC CORP., RALSTON PURINA CO., RHODIA INC., ROHM AND HAAS CO., THE UPJOHN CO., UNIROYAL INC., E.I. DUPONT DE NEMOURS & CO., AND VELSICOL CHEMICAL CORP.,

Plaintiffs-Appellees,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants

It is hereby ordered that the motion made herein by counsel for the appellee dated November 9, 1980 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) F.R.A.P. be and it hereby is granted.

HON. WILFRED FEINBERG,
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. CHARLES S. HAIGHT, D.J.
Circuit Judges

APPENDIX F

Constitutional Provisions, Statutes, and Regulations

1. United States Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Federal Pesticide Act of 1978, 92 Stat. 819, §§2 and 15, amending the Federal Insecticide, Fungicide and Rodenticide Act, §§3(c)(1)(D) and 10, 7 U.S.C. §§136a(c)(1)(D), and 136h (Supp. III, 1979)

Sec. 2. (a) Section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act is amended by —

(1) amending subsection (c)(1)(D) to read as follows:

"(D) except as otherwise provided in subsection (c)(2)(D) of this section, if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:

"(i) With respect to pesticides containing active ingredients that are initially registered under this Act after the date of enactment of the Federal Pesticide Act of 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not, without the written permis-

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sion of the original data submitter, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide: *Provided*, That such permission shall not be required in the case of defensive data;

"(ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the 'applicant') within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service.

The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator. If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or aribtration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the data in support of the application. Notwithstanding any other provision of this Act, if the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in support of which the data were used without further hearing. Before the Administrator takes action under either of the preceding two sentences, the Administrator shall furnish to the affected person, by certified mail, notice of intent to take action and allow fifteen days from the date of delivery of the notice for the affected

person to respond. If a registration is denied or canceled under this subparagraph, the Administrator may make such order as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Registration action by the Administrator shall not be delayed pending the fixing of compensation;

"(iii) after expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph, the Administrator may consider such item of data in support of an application by any other applicant without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data;"

. . . .

Sec. 15. Section 10 of the Federal Insecticide, Fungicide, and Rodenticide Act is amended by —

(1) in subsection (b), inserting immediately after "Nothwithstanding any other provision of this Act" the following: "and subject to the limitations in subsections (d) and (e) of this section"; and

(2) adding at the end thereof new subsections (d), (e), (f), and (g) as follows:

"(d) LIMITATIONS. —

"(1) All information concerning the objectives, methodology, results, or significance of any test or experiment performed on or with a registered or previously registered pesticide or its separate ingredients, impurities, or degradation products, and any information concerning the effects of such pesticide on any organism or the behavior of such pesticide in the environment, including, but not limited to, data on safety to fish and wildlife, humans and other mammals, plants, animals, and soil, and studies on

persistence, translocation and fate in the environment, and metabolism, shall be available for disclosure to the public: *Provided,* That the use of such data for any registration purpose shall be governed by section 3 of this Act: *Provided further,* That this paragraph does not authorize the disclosure of any information that —

"(A) discloses manufacturing or quality control processes,

"(B) discloses the details of any methods for testing, detecting, or measuring the quantity of any deliberately added inert ingredient of a pesticide, or

"(C) discloses the identity or percentage quantity of any deliberately added inert ingredient of a pesticide,

unless the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment.

"(2) Information concerning production, distribution, sale, or inventories of a pesticide that is otherwise entitled to confidential treatment under subsection (b) of this section may be publicly disclosed in connection with a public proceeding to determine whether a pesticide, or any ingredient of a pesticide, causes unreasonable adverse effects on health or the environment, if the Administrator determines that such disclosure is necessary in the public interest.

"(3) If the Administrator proposes to disclose information described in clause (A), (B), or (C) of paragraph (1) or in paragraph (2) of this subsection, the Administrator shall notify by certified mail the submitter of such information of the intent to release such information. The Administrator may not release such information, without the submitter's consent

until thirty days after the submitter has been furnished such notice: *Provided*, That where the Administrator finds that disclosure of information described in clause (A), (B), or (C) of paragraph (1) of this subsection is necessary to avoid or lessen an imminent and substantial risk of injury to the public health, the Administrator may set such shorter period of notice (but not less than ten days) and such method of notice as the Administrator finds appropriate. During such period the data submitter may institute an action in an appropriate district court to enjoin or limit the proposed disclosure. The court shall give expedited consideration to any such action. The court may enjoin disclosure, or limit the disclosure or the parties to whom disclosure shall be made, to the extent that —

"(A) in the case of information described in clause (A), (B), or (C) of paragraph (1) of this subsection, the proposed disclosure is not required to protect against an unreasonable risk of injury to health or the environment; or

"(B) in the case of information described in paragraph (2) of this subsection, the public interest in availability of the information in the public proceeding does not outweigh the interests in preserving the confidentiality of the information.

"(e) DISCLOSURE TO CONTRACTORS. — Information otherwise protected from disclosure to the public under subsection (b) of this section may be disclosed to contractors with the United States and employees of such contractors if, in the opinion of the Administrator, such disclosure is necessary for the satisfactory performance by the contractor of a contract with the United States for the performance of work in connection with this Act and under such conditions as the Administrator may specify. The Administrator shall require as a condition to the

disclosure of information under this subsection that the person receiving it take such security precautions respecting the information as the Administrator shall by regulation prescribe.

"(f) PENALTY FOR DISCLOSURE BY FEDERAL EMPLOYEES.—

"(1) Any officer or employee of the United States or former officer or employee of the United States who, by virtue of such employment or official position, has obtained possession of, or has access to, material the disclosure of which is prohibited by subsection (b) of this section, and who, knowing that disclosure of such material is prohibited by such subsection, willfully discloses the material in any manner to any person not entitled to receive it, shall be fined not more that $10,000 or imprisoned for not more than one year, or both. Section 1905 of title 18 of the United States Code shall not apply with respect to the publishing, divulging, disclosure, or making known of, or making available, information reported or otherwise obtained under this Act. Nothing in this Act shall preempt any civil remedy under State or Federal law for wrongful disclosure of trade secrets.

"(2) For the purposes of this section, any contractor with the United States who is furnished information as authorized by subsection (e) of this section, or any employee of any such contractor, shall be an employee of the United States.

"(g) DISCLOSURE TO FOREIGN AND MULTINATIONAL PESTICIDE PRODUCERS. — (1) The Administrator shall not knowingly disclose information submitted by an applicant or registrant under this Act to any employee or agent of any business or other entity engaged in the production, sale, or distribution of pesticides in countries other than the United States or in addition to the United States or to any other person who intends to deliver such data to such foreign or multinational business or entity unless the ap-

plicant or registrant under this Act to any employee or agent of any business or other entity engaged in the production, sale, or distribution of pesticides in countries other than the United States or in addition to the United States or to any other person who intends to deliver such data to such foreign or multinational business or entity unless the applicant or registrant has consented to such disclosure. The Administrator shall require an affirmation from any person who intends to inspect data that such person does not seek access to the data for purposes of delivering it or offering it for sale to any such business or entity or its agents or employees and will not purposefully deliver or negligently cause the data to be delivered to such business or entity or its agents or employees. Notwithstanding any other provision of this subsection, the Administrator may disclose information to any person in connection with a public proceeding under law or regulation, subject to restrictions on the availability of information contained elsewhere in this Act, which information is relevant to a determination by the Administrator with respect to whether a pesticide, or any ingredient of a pesticide, causes unreasonable adverse effects on health or the environment.

"(2) The Administrator shall maintain records of the names of persons to whom data are disclosed under this subsection and the persons or organizations they represent and shall inform the applicant or registrant of the names and affiliations of such persons.

"(3) Section 1001 of title 18 of the United States Code shall apply to any affirmation made under paragraph (1) of this subsection.".

3. Federal Insecticide, Fungicide and Rodenticide Act, §§3(c)(1)(D) and 10, as amended in 1972 by Pub. L. No. 92-516, 86 Stat. 979-80 (1972)

(c) PROCEDURE FOR REGISTRATION. —

(1) STATEMENT REQUIRED. — Each applicant for registration of a pesticide shall file with the Administrator a statement which includes —

(A) the name and address of the applicant and of any other person whose name will appear on the labeling;

(B) the name of the pesticide;

(C) a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use;

(D) if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by section 10(b). If the parties cannot agree on the amount and method of payment, the Administrator shall make such determination and may fix such other terms and conditions as may be reasonable under the circumstances. The Administrator's determination shall be made on the record after notice and opportunity for hearing. If the owner of the test data does not agree with said determination, he may, within thirty days, take an appeal to the federal district court for the district in which he resides with respect to either the amount of the payment or the terms of payment, or both. In no event shall the amount of payment determined by the court be less than that determined by the Administrator;

. . . .

Sec. 10. PROTECTION OF TRADE SECRETS AND OTHER INFORMATION.

(a) IN GENERAL. — In submitting data required by this Act, the applicant may (1) clearly mark any portions thereof which in his opinion are trade secrets or commerical or financial information and (2) submit such marked material separately from other material required to be submitted under this Act.

(b) DISCLOSURE. — Notwithstanding any other provision of this Act, the Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential, except that, when necessary to carry out the provisions of this Act, information relating to formulas of products acquired by authorization of this Act may be revealed to any Federal agency consulted and may be revealed at a public hearing or in findings of fact issued by the Administrator.

(c) DISPUTES. — If the Administrator proposes to release for inspection information which the applicant or registrant believes to be protected from disclosure under subsection (b), he shall notify the applicant or registrant, in writing, by certified mail. The Administrator shall not thereafter make available for inspection such data until thirty days after receipt of the notice by the applicant or registrant. During this period, the applicant or registrant may institute an action in an appropriate district court for a declaratory judgment as to whether such information is subject to protection under subsection (b).

4. The Trade Secrets Act, 18 U.S.C. §1905 (1976)

Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partner-

ship, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more that $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

5. Regulations of United States Department of Agriculture

7 C.F.R. §1.3(b)(1) (1949 ed.)

§1.3 *Records of limited availability.* The records enumerated below are of limited availability and information contained therein shall not be disclosed, nor shall a copy thereof be furnished, except in proper cases upon requests from Federal official sources or as specifically provided:

(a) Reports and records which by statute may be made available only in suits or administrative proceedings will be available only under the conditions provided for in the statute.

(b) Upon approval of the head of the bureau, agency or branch concerned, based upon the considerations prescribed in §1.5 the following records shall be available as indicated:

(1) Applications, reports, and like records, together with supporting data and documents, other than those under §1.2, and paragraphs (a), (b), (3) and (4) of this section, submitted by an applicant for relief, license, certificate, use, loan, grant or other benefit provided by law or by regulations authorized by law, shall be made available to the person who furnished the record, and also under compulsory process.

7 C.F.R. §1.2(a) (1954 ed.)

§1.2 *Confidential records.* The following records are confidential and shall not be subject to examination, nor shall copies thereof be furnished upon any request except in proper cases from Federal official sources:

(a) All records and reports required by statutes to be held confidential by the Department.

7 C.F.R. § 1.4(a) (1962 ed.)

§1.4 **Restriction on availability.**

The following rules shall govern the availability for examination, or the furnishing of copies, of matters of official records of the Department:

(a) *Restricted by Presidential Directive, statute, or Records Security Regulations and other regulations.* The provisions of the applicable directives, statutes, or regulations of this Department or of other agencies govern the circumstances and extent of the restriction.

7 C.F.R. §1.4(b)(15) (1962 ed.)

(b) *Administratively confidential.* The following records are administratively confidential and shall not be subject to examination except in the performance of official duties, nor shall copies thereof be furnished upon request except in proper cases from Federal official sources or as specifically provided:

. . . .

(15) Data concerning products and formulations provided by industry for research purposes or in connection with the Department's registration and other regulatory functions.

7 C.F.R. §370.13(d) (1968 ed.)

Exempt records of ARS include the following:

. . . .

(d) Matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential. This would include but would not be limited to:

(1) Scientific and technical data on products or processing methods submitted by contractor, grantee, cooperator and manufacturer or processor.

(2) Data in research studies including information on commercial facilities and procedures where disclosure would adversely affect the respondent.

(3) Records concerning research project descriptions, progress reports or information concerning incomplete research prior to formal publication when such release would adversely affect the public interest.

(4) Data on products, sales, manufacturing or processing nethods (includes data on plants, animals or animal by-products, being moved by permit or license, etc.) from manufacturers or processors, licensee, registrant, permittee and laboratory or field tests.

6. Regulations of United States Food and Drug Administration, Department of Health, Education, and Welfare

32 Fed. Reg. 9318-19 (1967), amending 10 C.F.R. § 5.74

§5.74 **Trade secrets and commercial or financial information obtained from any person and privileged or confidential.**

This exemption protects generally against disclosure of information which the person furnishing it customarily would not release to the public or which is submitted by him in reliance upon the Department's assurance that it will not be disclosed. It includes records which fall in any one of such categories as: Trade secrets; technical, commercial, or financial information which is privileged through general custom and usage in the same line of endeavor; information which is obtained from any person under explicit or implicit pledge of confidentiality; and information which is privileged under any of the following privileges: Doctor-patient, lender-borrower, attorney-client, or Government-informer privileges. It also includes data and views of scientists, scholars, or consultants submitting or making judgments on research designs in applications for grant or other support.

. . . .

APPENDIX A — EXAMPLES OR KINDS OF EXEMPT RECORDS

This appendix sets forth examples of kind of materials which are exempt from mandatory disclosure pursuant to one

or more of the exemptions in subsection (b) of the Act and Subpart F of this part.

11. Respecting Food and Drug Administration regulatory activities: Trade secrets or commercial or confidential information voluntarily revealed in requests for opinions, and opinions and related records indicating that a person, firm, or product is or is not in compliance with the law; records relating to factory inspections, sample collections, seafood inspection and other examinations and investigations by the Food and Drug Administration; Investigational New Drug files; New Drug Applications and master files, other than final printed labeling; reports and records relating to individual adverse drug reaction(s); data in support of petitions relating to pesticide chemicals, food standards, food additives, and color additives, and master files relating thereto; files relating to certification of insulin, antibiotics, and color additives, and master files relating thereto; notices of hearing issued to individuals and firms under 21 U.S.C. 335 and records relating thereto; records relating to research in support of actions to further the law enforcement or regulatory activities of the Food and Drug Administration.